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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 58.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

HENRY C. MURPHY, *Respondent*.

BRIEF FOR RESPONDENT.

HARRY RAYMOND TURKEL,
Attorney for Respondent.

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OPINIONS BELOW.

The opinion of the Board of Tax Appeals for the District of Columbia (R. 4-10) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 19-23) is reported at 119 F. (2d) 451.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on March 24, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The statement of the case as given in petitioner's brief, pages 2 and 3, is substantially correct.

STATUTE INVOLVED.

Section 2(a) of the District of Columbia Income Tax Act, (53 Stat. 1087) Section 980a. Title 20, D. C. Code, 1929, Supplement V, provides as follows:

> "TAX ON INDIVIDUALS.—There is hereby levied for each taxable year upon the taxable income of every individual domiciled in the District of Columbia on the last day of the taxable year a tax at the following rates:"
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SUMMARY OF ARGUMENT.

I.

Congress did not intend the Act to apply to Federal employees in the District of Columbia unless they had abandoned their domiciles in the states.

II.

The decision of the Court below was based upon correct principles of law and was equitable because it avoided double taxation.

III.

A reversal of the decision of the Court below would immediately deprive at least 24 states of the right to tax Federal employees in the District of Columbia domiciled in those states, and would subject Federal employees from two states to double taxation.

ARGUMENT.

I.

Congress did not intend the Act to apply to Federal employees in the District of Columbia unless they had abandoned their domiciles in the states.

Since the essence of the present case is the interpretation to be given to the word "domiciled", it seems necessary to trace the legislative history of the act imposing the tax liability. The act itself does not define the term.

Reference will be made to the first House bill because it shows the point of departure. According to the report of the House Conferees, the House bill originally provided:

> "(b) the tax to be imposed on all residents of the District of Columbia, regardless of source of income, and on nonresident individuals and corporations on income from sources within the District, with provisions for tax paid in other jurisdictions to avoid double taxation."[1]

The language of this report shows clearly that at the outset the House desired to avoid double taxation. It recognizes that there may be persons resident in the District of Columbia who are domiciled in the several states. Accordingly when it was planned to base tax liability upon residence, provision was made for a credit against taxes paid in other jurisdictions.

The bill was amended on the floor of the House so as to exempt from the income tax "Senators, Representatives, Delegates, Resident Commissioners, officers and employees of the Senate and House of Representatives of the United States."[2] This exemption provision was unacceptable to the Senate, and the bill was sent to conference where agreement was reached on the principle that the tax should be

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[1] 84 Cong. Record (Part 8) 8971; for digest of history of H. R. 6577, see 84 Cong. Record (Part 15), Index, p. 849.

[2] 84 Cong. Record (Part 7) 7036.

levied on "every individual domiciled in the District of Columbia on the last day of the taxable year."

There follows an explanation from the report of the managers on the part of the House which throws light upon the omission from the final Act of any provision for a tax credit.

> "(b) the tax is imposed on persons domiciled in the District on the last day of the taxable year, regardless of source of income, and upon corporations on sources from within the District, no tax is imposed on individuals domiciled without the District from sources within the District, and no provision is made for credit allowance to persons domiciled in the District for tax paid to other jurisdiction on income from sources therein."[1]

It seems clear that when the basis of tax liability was shifted from "residence" to "domicile", no provision was made for a tax credit, because the tax was not to be imposed on those persons domiciled outside the District. The omission of the tax credit provision ought not to be construed as sanctioning double taxation, but rather as an indication that the drafters of the bill thought it unnecessary to do so because they had segregated the classes of taxpayers in such a way as to avoid double taxation; that is, those persons domiciled in the states were to pay income taxes to the states, and those persons domiciled in the District were to pay income tax to the District.

It being clear that the Congress did not intend to subject Federal employees in the District of Columbia to double taxation, it is appropriate to inquire whether the Congress intended the Federal employees in the District of Columbia to be subjected to income taxation in the states *or* in the District of Columbia.

Senator Overton, chairman of the managers on the part of the Senate, in reporting the action of the conferees, stated

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[1] 84 Cong. Record (Part 8) 8971.

with reference to the imposition of tax liability on the basis of domicile:

> "Mr. President, I now call attention to the fact that the individual income tax is imposed only on those domiciled in the District of Columbia. It, therefore, necessarily excludes from its imposition all Senators and Members of the House of Representatives, the President of the United States, all Cabinet officers, and *Federal employees who have been brought into the District from the various States of the Union to serve their Country in the National Capital, provided such employees have not of their own volition surrendered their domiciles in the States and have voluntarily acquired domiciles within the District of Columbia.*"[1]

Counsel for the petitioner refer to this evidence as to the intent of Congress and attempt to dismiss it as being merely an expression of personal opinion (Petitioner's Brief, p. 28). This view is believed to be erroneous and based upon conjecture.

It is urged that the view as to the interpretation of the word "domicile" as given by Senator Overton, also prevailed among the managers on the part of the House, except Representative Dirksen.

On July 12, 1939, the day after Senator Overton's explanatory statement, Mr. Bates of Massachusetts, one of the conferees on the part of the House, replied to a statement by Mr. McCormack that if Federal employees were to be subjected to Federal, State, and District of Columbia income taxes, the Congress would be compelling them involuntarily to give up the exercise of their suffrage.

Mr. Bates stated:

> "That particular point that my colleague from Massachusetts raises was made in the committee of conference by both the gentleman from Illinois and myself. We raised that particular point because we are much concerned about how those who come from our States would be affected by the income tax provisions of the

[1] 84 Cong. Record (Part 8) 8825.

> new law, and it is distinctly understood that in this bill there should be no triple taxation, and I well recall Senator Tydings raising the point also."[1]

A definition of the term "domicile" was announced on the floor of the House which was not challenged, and consequently should be given great weight in determining the interpretation to be given to that word.

Mr. Nichols of the Committee on the District of Columbia submitted the Conference Report which ultimately became the present law:

> "Mr. Nichols: Since the question of the effect of the word 'domicile' in this Act has been raised, I think the House would probably like the legal definition read:
>
> " 'Domicile is the place where one has his true, fixed, permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights—There must exist in combination the fact of residence and animus manendi—'
>
> which means residence and his intention to return (sic); so that under this definition he could certainly live in the District of Columbia and have his legal domicile in any other State in the United States."[2]

Counsel for the petitioner in their brief at page 27 allege that the statement made by Mr. Bates does not bear upon the point and that the definition read by Mr. Nichols was not adopted by the House. All of the discussion in the Congress is printed in the petitioner's brief (pp. 21-26) and respondent is satisfied that a reading of this discussion leaves the conclusion that the prevailing opinion was that Federal employees in the District of Columbia were not to be subject to the tax unless they had surrendered their domiciles in the States from which they were appointed and acquired domiciles in the District of Columbia. It has been

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[1] 84 Cong. Record (Part 8) 8973.

[2] 84 Cong. Record (Part 8) 8974.

frankly stated by the respondent to the Court below, and in the brief in opposition to the granting of a writ of certiorari, that Mr. Dirksen did not share this view, but it has been maintained and is again maintained that the prevailing view among the conferees was that the interpretation to be accorded to the word "domiciled" would leave the Federal employee liable to income taxation in his home state and exempt in the District of Columbia.

II.

The decision of the Court below was based upon correct principles of law and was equitable because it avoided double taxation.

A.

The decision of the Court below was based upon correct principles of law. The domicile of a Federal employee in the District of Columbia is not to be determined under the same general rules applicable to persons in private employment.

The decision in the Court below was rested squarely upon the statement of law enunciated in the case of James J. Sweeney v. District of Columbia[1] which arose on essentially identical facts. The question for decision was stated by that Court as follows:

> "Boiled down to its essence, the question here is whether a citizen and resident of a state must surrender his state allegiance for all the purposes in which domicil may be controlling when he accepts Federal employment in the District of indefinite or relatively permanent duration."

The decision of that case is as follows:

> "Accordingly we think that one who comes to the District and remains to render service to the Govern-

[1] 72 App. D. C. 30 (1940), 113 F. (2d) 25 (1940), cert. den. 310 U. S. 631.

ment which requires his presence here, may retain his domicile in the State from which he comes until the service terminates unless he gives clear evidence of his intent to forego his state allegiance. * * * The considerations which we have held controlling require that evidence of intention to change be clear and unequivocal. * * *"

The Court reasoned that a contrary decision would create unjust and intolerable discriminations. It would permit military men, elected officials, and officials appointed for a definite term to retain their state domiciliation, and to deprive of state domiciliation and impose that of the District upon members of the Federal Courts, members of administrative tribunals enjoying long, but not unlimited tenure, and upon Civil Service employees.

The Court advanced additional reasons to support its view:

"Without regard to constitutional considerations, the system would be strange which would permit or require state domiciliation for elected legislative and executive officials and deny it automatically to co-ordinate judicial officers or compel them to maintain it by residing outside the District and in a state not otherwise of their choice. Equally, if not more, strange would be one so capable of discriminating, in practical consequences and legal effects, between the high and the low, the well-to-do and the poor in the Federal service. If such a price were placed so broadly upon the acceptance of Federal duty, the consequences would be entirely unpredictable, whether for the Government or for the individuals immediately concerned. Many would accept it of necessity. Others would not do so for any preferment. State attachment is not incompatible with Federal service. On the contrary, it remains a compelling allegiance, secondary only to national loyalty, not merely for a few, but for all Federal servants who do not prefer District domiciliation. Our dual system contemplates a harmony, not an antagonism, of state and national allegiances. Each is the complement, not the antithesis, of the other. A rule which would compel surrender of the one in order to

> exercise the other fully would be inconsistent with these principles. Creation of a vast army of Federal officials and employees detached from the states in all of the civil and political relations which domicil sustains is not a thing desired or desirable, whether regarded from the point of view of the Government, the states, or the individuals. That connection with the home community is a key pin in the structure of the dual system. It should not be weakened or destroyed, as it would be by acceptance of respondent's view." (Footnotes omitted)

Counsel for the petitioner attempt to avoid the rule of law enunciated in the Sweeney case by arguing that Federal employees may be domiciled in the District of Columbia for purposes of taxation, and domiciled in their home states for other purposes. While admitting that there is a difference between citizenship and domicile, it cannot be admitted that domicile is divisible.

One of the few propositions in the law of domicile upon which all authorities are agreed is that an individual may have one, and only one, domicile.

Mr. Justice Holmes in the case of *Williamson* v. *Osenton*[1] stated:

> "The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined. Bergner and Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 157. In its nature it is one, and if in any case two are recognized for different purposes, it is a doubtful anomaly. Dicey, Conflict of Laws, 2d Ed. 98."
>
> See also: Beale, Conflict of Laws, (1935) Vol. I, p. 123, Kennan on Residence and Domicile, (1934) Sec. 13, pp. 34-35.

The Court below considered the proposition that there is a distinction between civil and political domicile and the proposition was rejected by the Court as being "more theo-

[1] 232 U. S. 619, 625 (1914).

oretical than practical, argumentatively specious than safely tenable."[1]

The rule that the Federal employee is entitled to retain his domicile in the state from which he was appointed, which was confirmed in the *Sweeney* case, is supported by the clear weight of judicial authority, many instances of Congressional recognition in principle, and the long-established custom and practice of other officials and departments.[2]

Since domicile must be one, the question seems to be whether, after residence in the District of Columbia, coupled with the intent to stay here so long as his Federal employment continues, the Federal employee shall be conclusively deemed to be domiciled in the District of Columbia, or whether he shall be permitted to retain the domicile of the state from which he was appointed if he so desires.

In this connection it is pertinent to note that practically all states have provisions either in their Constitution or laws, requiring domicile as a condition for the exercise of the franchise and providing that absence in the Government service does not prevent loss of "residence."

In this case, for example, Section 2 of Article III of the Constitution of Michigan reads as follows:

> "No elector shall be deemed to have gained or lost a residence by reason of his being employed in the ser-

[1] 72 App. D. C. 30, 35 (1940); 113 F. (2d) 25, 30 (1940). The idea of "fiscal domicile" appearing in European tax treaties as applied to individuals means the same as "domicile" in this country, League of Nations C. 118 M. 57. 1936. II. A. pp. 9 and 23; it was adopted of necessity and was not intended to change concepts of domicile in other fields, L. of N., F. 212 of February 7, 1925, p. 20; "fiscal domicile" means one thing for income tax and something else for succession duties, F./Fiscal 111 of June 22, 1939, p. 17. Finally the idea of "fiscal domicile" has not been accepted by this country in dealing with continental countries. (U. S.-Swedish Tax Convention, signed March 23, 1939; U. S. Treaty Series No. 958, and U. S.-French Tax Convention, signed July 25, 1939, 76th Congress, 3d Session, Executive Report No. 7.)

[2] See citations and footnotes in Sweeney v. District of Columbia, 72 App. D. C. 30, 37 (1940); 113 F. (2d) 25, 32 (1940). The rule is of ancient origin. Bruce v. Bruce (1790), 2 Bosanquet & Puller 229, and Atherton v. Thornton (1835), 8 N. H. 178.

vice of the United States or of this state, nor while engaged in the navigation, etc. * * *"[1]

If this Court confirms the common law doctrine that domicile is indivisible and at the same time rules that Federal employees are domiciled in the District of Columbia, it will deprive Federal employees of their franchise in the several states.

B.

The decision of the Court below was equitable because it avoided double taxation.

The decision of this Court in the case of *Graves* v. *O'Keefe*, 306 U. S. 466, was handed down on March 27, 1939. That decision stated that there was no principle of constitutional law exempting Federal salaries from state taxation or exempting state salaries from Federal taxation. Within sixteen days, on April 12, 1939, the Public Salary Tax Act was approved.[2] That Act extended the Federal income tax to state compensation and provided that state income tax laws may apply to Federal compensation.

A large number of state legislatures immediately amended their income tax laws to eliminate Federal salaries from the list of items of income to be excluded from gross income. In 1939, seventeen states removed the exemption heretofore accorded. The laws of nine others automatically provided for taxation of Federal salaries whenever the Federal law permitted, or whenever state salaries became subject to Federal taxation. Six additional states removed the exemptions in 1940 and 1941.

It is abundantly clear that Federal salaries are, in fact, taxable under the laws of all states having personal income tax laws. Whether salaries derived by Federal employees in the District of Columbia are subject to these state laws is a matter of interpretation.

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[1] Compiled Laws of the State of Michigan, 1929, p. 203.

[2] 53 Stat. (Part 2) 574. See Title I, Sections 1 and 4.

Counsel for the petitioner in their brief at pages 16 and 17 allege:

> "Examination of the laws and regulations of the remaining twenty-three states disclose that in only one instance do such laws and regulations indicate an intention to extend the tax to individuals (either Government employees or others) having their homes and actually residing and earning their income without the state."

Counsel for the respondent has likewise examined carefully all of the income tax laws and some of the regulations of the various states and comes to contrary conclusion. Not being content to rest his case upon such an examination alone, on September 3, 1941, he addressed the State Income Tax Departments of 32 states which were believed to subject the salaries in question to state taxation, and inquired whether "You would consider a person who claims to be domiciled in your State, but who works for the Federal Government in the District of Columbia and maintains a home here, as liable to your State Income Tax on his Federal salary."

Of the 31 replies received, 25 states unequivocally replied that Federal employees in the District of Columbia, claiming domicile in the states from which they were appointed, were subject to state taxation on their Federal salaries. Five state administrators replied in the negative, and one reply was doubtful.

There has been filed with the Clerk of this Court nine copies of a table entitled "Liability to State Income Taxation of Federal Employees in the District of Columbia Claiming Domicile in the States From Which They Were Appointed." The second column of this table has a carefully prepared list of citations to those provisions of the state income tax laws which define the term "residents" and make Federal salaries subject to state taxation. The third column indicates briefly the opinions of the state tax administrators. The originals of the letters containing these opinions have also been filed with the Clerk.

If the Court below had held Federal employees from the various states to be domiciled in the District of Columbia, they would have been subjected to income taxation on those salaries in the District of Columbia as well as in the majority of the states. The decision of the Court below was, therefore, entirely equitable.

III.

A reversal of the decision of the Court below would immediately deprive at least 24 states of the right to tax Federal employees in the District of Columbia domiciled in those states, and would subject Federal employees from two states to double taxation.

While it is believed that the Court below was correct in permitting Federal employees in the District of Columbia to retain their domiciles in the states from which they were appointed, it is recognized that it is possible for this Court to assign Federal employees a domicile in the District of Columbia. Since no individual may be domiciled in more than one place, to hold that a Federal employee is domiciled in the District of Columbia is to relieve him of domicile in the state from which he was appointed. To relieve a Federal employee in the District of Columbia of domicile in the state from which he was appointed is to relieve him of taxation in that state, since nearly all states which tax Federal employees in the District of Columbia do so on the ground that they are domiciled in those states.

It is argued to this Court that the Public Salary Tax Act was intended to permit the several states to tax all Federal salaries. There is no express condition forbidding them to tax Federal salaries of their citizens derived in the District of Columbia. Nevertheless, a reversal of the decision of the Court below will bar them from continuing in this field of taxation.

A reversal of the decision of the Court below by this Court would immediately subject Federal employees from

Delaware and Missouri to double taxation, whereas at the present time they are subject to income taxation only in those states. These states impose liability on the basis of *citizenship* as well as residence.[1] To hold that Federal employees from the states are domiciled in the District of Columbia would be to subject them to income taxation in the District of Columbia while leaving them liable to taxation in those states. The affirmation of the decision of the Court below would leave them liable to taxation in those states alone.

Essentially, the question in the case *Graves* v. *O'Keefe* was one of taxation, as opposed to escape from taxation. In the present case, the essential question has been taxation, as against double taxation; but in its final stage the question is: where shall the Federal employee in the District of Columbia be subjected to income taxation? It is submitted that the legislative history of the act, the law, and the equities require that the Federal employee in the District of Columbia who intends to return to his home state be subjected to but one income tax, and that in the state from which he comes.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that respondent was not domiciled in the District of Columbia on December 31, 1939, and that the decision of the Court of Appeals should be affirmed.

HARRY RAYMOND TURKEL,
Attorney for Respondent.

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[1] Revised Code of Delaware, 1935, Sec. 144 (b) (1), and Revised Stat. of Missouri, 1939, Vol. II, Sec. 11343 (p. 2972).